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No. 86-893

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

JACKSON WATER WORKS, INC., and
CITIZENS UTILITIES COMPANY,
Petitioners,

vs.

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE SAN GABRIEL VALLEY WATER COMPANY IN SUPPORT OF PETITION

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BRIEF OF AMICUS CURIAE SAN GABRIEL VALLEY WATER COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

San Gabriel Valley Water Company respectfully submits this brief in support of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Written consent to the filing of this brief has been obtained from all parties and has been lodged with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

San Gabriel Valley Water Company ("San Gabriel") is one of several hundred privately owned utility companies serving California. Like Petitioner, San Gabriel is the respondent in an eminent domain valuation proceeding brought by a municipality and pending before the California Public Utilities Commission ("PUC"). In instituting that action, the condemnor

had the unrestricted discretion under the same statutory scheme at issue here to litigate before either the PUC or the superior court. Because the condemnor elected to proceed before the PUC, San Gabriel will not be afforded a jury trial or meaningful opportunity to appeal. Both rights are provided when a condemnor chooses to proceed in superior court.

Like Petitioner, San Gabriel has been placed in a class of privately owned utilities subjected to condemnation which is not afforded the same procedural rights provided identically situated parties. San Gabriel's interest in a jury trial and a meaningful appeal is not based on legalistic abstraction. As demonstrated below, the PUC adheres to a policy favoring condemnation of certain privately owned utilities and employs valuation standards calculated to advance that policy. Absent the safeguards of jury trial and meaningful appellate review, the PUC is free to improperly use its judicial power to advance its legislative goals at the expense of San Gabriel and others.

SUMMARY OF ARGUMENT

The state statutory scheme at issue violates the Equal Protection Clause because it fails the rational basis test. The first part of the test is "whether the challenged legislation has a legitimate purpose." Appendix to Petition, pp. A-8, A-9. The Ninth Circuit identified an apparent legitimate legislative purpose behind establishing the PUC and the superior court as alternate forums: the PUC's expertise presumably qualifies it to hear larger, more complex cases. Without conceding that point, San Gabriel does not challenge that conclusion in this case.

However, the California statute fails the second part of the rational basis test, *i.e.* "whether the challenged classification promotes that purpose." Appendix to Petition, p. A-9. The statutory scheme bestows unlimited discretion on a condemnor to proceed in superior court or before the PUC. Thus, a condemnor is empowered to discriminate between condemnees on any basis even if the classification thereby created

is not rationally related to the legislative purpose. This arbitrary discrimination violates the Equal Protection Clause since it results in the denial of the rights to both jury trial and meaningful appeal. *Humphrey v. Cady*, 405 U.S. 504, 512 (1972) (denial of jury trial); *Lindsey v. Normet*, 405 U.S. 56, 77-78 (1972) (denial of meaningful appeal).

The decision of the majority avoids this conclusion through the fiction that the condemnor will always exercise its unlimited discretion in a way consistent with legislative purpose. ("Presumably, the legislature believed that the City would exercise its discretion in an appropriate manner." Appendix to Petition, p. A-12.) This is a dangerous precedent which assumes away the second part of the rational basis test and is inconsistent with the decisions of this Court.

In applying the rational basis test where the power to discriminate has been delegated by the state to another public instrumentality (e.g., a city), this Court has asked whether the power delegated is so broad as to permit the governmental instrumentality to engage in arbitrary discrimination with no rational relation to a legitimate legislative purpose. *Humphrey v. Cady, supra,* 405 U.S. 504, 512. This Court has never engaged in the fiction that a public instrumentality, which is given the power to act arbitrarily, will be presumed to act properly.

Such a fiction is dangerous since it permits states to engage in discrimination on any basis simply by avoiding explicit statutory classifications while delegating to its agents unrestricted discretion to discriminate. The majority opinion below engaged in this fiction even though the state agent is a party to the litigation in which the classification is applied and, therefore, has interests to advance which are unrelated to the efficient adjudication of complex cases. In short, the majority is willing to assume the condemnor engaged in discrimination to advance the legislative purpose when, as the dissent notes, common sense suggests the discrimination is rationally related only to the condemnor's litigation interests. Appendix to Petition, p. A-20.

The arguments advanced in this brief do not repeat the arguments made by the petitioner, who asks this Court to address the rational basis/strict scrutiny dichotomy and to accomodate through equal protection standards the importance of the interests affected by the state scheme. San Gabriel files this brief because it believes this Court would be assisted by an analysis under the rational basis standard. As that analysis demonstrates, if the opinion of the Ninth Circuit is not reversed, its force as precedent threatens the future viability of the rational basis test. If that test is rendered ineffective, this Court might then have no other choice but to adopt an entirely new approach to enforcing the Equal Protection Clause.

ARGUMENT

I

THE PETITION SHOULD BE GRANTED BECAUSE OF THE FREQUENCY AND SCOPE OF THE DISCRIMINATION INVOLVED AND BECAUSE OF CONFLICTS BETWEEN THE DECISION BELOW AND OPINIONS OF THIS COURT.

There are several important reasons why this Court should exercise its discretion to grant the petition for a writ of certiorari. First, the problem raised by this case is not unique. Petitioner and San Gabriel are only two of many investor owned utilities in California that have been subjected to valuation proceedings before the PUC. The property of all those companies has been valued without jury trial or meaningful appeal. Both rights are afforded similarly situated companies in proceedings before the superior court.

Second, it is also vital to consider the potential scope and effect of the problem in the future. There are nearly 300 investor owned water utility companies, as well as numerous other investor owned utility companies, in California. The collective assets of those companies are worth billions of dollars. Each of these companies will be subject to the statu-

tory scheme at issue should a state instrumentality decide to condemn.

As demonstrated in part III of this section, the PUC has a policy favoring the condemnation of certain types of privately owned utilities and valuing those utilities in a way to encourage condemnation. It is reasonable to expect that state instrumentalities with the power of eminent domain will be encouraged, and the statutory scheme at issue will be applied with even greater frequency, in the future.

Third, at least one other state has enacted a similar statute. Thus, the scope of the equal protection problem in this case and the precedential effect of the decision below are of national concern. Under New Jersey law, the Port Authority of New York is given the power of eminent domain over property in New Jersey needed for air terminal purposes. *N.J.S.A. 32:1-35.15.* Like the California statute, New Jersey law gives the Port Authority the unrestricted option of proceeding under the normal New Jersey condemnation procedures or under special procedures devised for the Port Authority. *N.J.S.A. 32:1-132.* Under the normal procedures, a jury trial is available upon request. *N.J.S.A. 20:3-12(b); 20:3-13(a), (b).* Under the special procedures, the amount of compensation afforded the condemnee is decided by a judge without a jury. *N.J.S.A. 32:1-35.15(i).* A majority of the New Jersey Supreme Court rejected an attack on this statutory scheme based on the Equal Protection Clause. *Port of New York Authority v. Heming*, 34 N.J. 144, 167 A.2d 609 (1961). The majority and dissenting opinions in that case are strikingly similar in approach to their counterparts in the Ninth Circuit decision at issue here.

Finally, and most important, the petition should be granted because the opinion of the Ninth Circuit conflicts with decisions of this Court which define the content of the rational basis test. As the following analysis demonstrates, the Ninth Circuit's opinion sets a dangerous precedent which, if left undisturbed, provides states with a mechanism for rendering the rational basis test meaningless.

II

THE CALIFORNIA STATUTORY SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT EMPOWERS CONDEMNORS TO DISCRIMINATE ARBITRARILY AND WITHOUT REGARD TO ANY LEGITIMATE STATUTORY PURPOSE.

A. The California Statutory Scheme.

The property of an investor owned utility can be condemned in California under two very different procedures. The condemnor may institute a proceeding in the superior court, which is the usual forum for condemnation litigation. *Cal. Civ. Proc. Code §§ 1230.060, 1250.010.* In such a proceeding, each party has the right to have the question of compensation determined by a jury. *Cal. Const. art. I, § 19.* Each party is also entitled as a matter of right to appeal such determination to the California Court of Appeal. *Cal. Civ. Proc. Code §§ 904.1, 1230.040; Cal. Const. art. VI, § 11.* The parties may also seek review of the Court of Appeal's decision by the California Supreme Court. *Cal. Rules of Court, Rule 28.* Further, the California Evidence Code must be followed by the trial court, *Cal. Evid. Code § 300.*

Alternatively, the condemnor may bring the proceeding before the PUC. The valuation determination then is made by the PUC based upon a decision of an administrative law judge regularly employed by the PUC. Neither an administrative law judge, nor a member of the PUC is required to be a member of the bar or have a legal education, and the proceedings need not be governed by the rules of evidence. *Cal. Pub. Util. Code § 1701.* No jury trial is available. *Cal. Pub. Util. Code § 1411.* Moreover, no meaningful right to appeal from the PUC is provided. The condemnee may only petition the California Supreme Court for a writ of review. *Cal. Pub. Util. Code §§ 1416, 1756, 1759.* The scope of review is much narrower than exercised over a superior court judgment; the only issue is whether the PUC "regularly pursued its authority". *Cal. Pub. Util. Code § 1757.* As petitioner notes, the California Supreme Court does not have a copy of the record when it

decides whether to grant review, has not granted such a writ in a valuation case in approximately fifty years and, in the seventy year history of the statutory scheme at issue, has never reversed, modified or even remanded a compensation decision of the PUC.

The power to select between these procedures is unilateral; only the condemnor has the power and the condemnee has no right to object to the condemnor's choice. The condemnor's discretion is absolute; the statute places no limits on that discretion and no guidelines are established to encourage choices consistent with the purpose of the legislation. In other words, the state instrumentality seeking to condemn the privately owned property can make its selection of forum and procedures on any basis, and without any explanation. (See, *e.g.* Petition p. 14, fn. 12.)

B. This Statutory Scheme Fails the Second Part of the Rational Basis Test.

While rational basis is not a demanding standard for judging equal protection claims, it is "not a toothless one." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981), quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). The test has two parts. First, it must be determined if the challenged legislation has a legitimate purpose. Assuming a legitimate purpose, it must then be decided if the discrimination permitted by the statute bears a rational relation to that purpose. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-63 (1981), *rehrg. den.* 450 U.S. 1027.

The Ninth Circuit had no difficulty finding a legislative purpose behind establishing the PUC as an alternative forum for private utility condemnations:

> "It appears that the California legislature, in creating the dual forum system, expected that the particular expertise of the PUC would further the interests of justice and economy in some instances but not in others. Presumably, the larger, more complex adjudications would be handled by the PUC." Appendix to Petition, p. A-9.

As noted, San Gabriel does not challenge this conclusion.

However, as noted by the dissent, the California statutory scheme fails the second part of the rational basis test. The condemnor is given unlimited discretion to choose between the alternative procedures. If the condemnee so chooses, it may proceed in superior court with complex cases and bring simple cases before the PUC. In fact, the condemnor need not base its exercise of discretion on the size or complexity of the case. The condemnor is free to exercise its choice on any basis, including how sympathetic a jury or the PUC is likely to be toward a given condemnor or against a given condemnee. Thus, the classifications authorized by this delegation of discretion are purely arbitrary and bear no rational relation to the acknowledged legislative purpose. Such a conclusion is compelled by three opinions of this Court.

(i.) Lindsey v. Normet.

In *Lindsey v. Normet*, *supra*, 405 U.S. 56, this Court considered an Oregon statute which provided that, in an eviction proceeding for non-payment of rent, a tenant who wished to appeal from an adverse decision must post a bond for twice the amount of rent expected to accrue pending appeal. Oregon law imposed a lesser bond requirement to appeal decisions in other types of civil cases. 405 U.S., at 74-75.

This Court applied a rational basis test to the tenant's equal protection claim. 405 U.S., at 73-74. The first part of that test was deemed satisfied since it was clear that a state could have a legitimate legislative purpose for burdening the right to appeal:

> "[A] State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession . . . ." 405 U.S., at 77.

However, this Court unanimously agreed that the second part of the rational basis test was not satisfied:

> "The double-bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord .... The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." 405 U.S., at 77-78.

The same reasoning applies to the California statutory scheme which empowers condemnors to force some condemnees into a proceeding in which they are denied any meaningful appeal while allowing other condemnees full appellate rights. As in *Lindsey,* there is no logical connection between the purpose of the California legislation — channeling complex cases to the PUC — and a classification which denies any meaningful appeal to utilities haled before the PUC. Indeed, logic dictates that it is the complex case in which error is most likely and appellate review most needed.

Even assuming that such a logical connection exists, the California statutory scheme is still defective because, as in *Lindsey,* condemnors are permitted to engage in discrimination which is entirely arbitrary and unrelated to the legislative purpose. Condemnors are not limited to bringing complex cases before the PUC. Condemnors are not even guided in that direction by the statute. Instead, condemnors are free to make whatever classification they desire, including bringing simple cases before the PUC while sending the complex matters to the superior court. In fact, that is precisely what has occurred in this case: Petitioner services a small community and presents a condemnation problem of little complexity. Petition, p. 14, fn. 12.

It is important to realize what arguments are *not* advanced by *Lindsey* or in this analysis. First, this analysis does not rest on the premise that there is a due process right to meaningful

appeal in a condemnation action. The argument is simply that, *if* a state affords such right to some privately owned utilities in condemnation actions, it may not arbitrarily deny that right to similarly situated parties:

> "The Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review .... When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet, supra*, 405 U.S. 56, 77.

Second, it is not contended that a state must employ identical procedures for all condemnation actions. Assuming a legitimate legislative purpose, it is clear that a state may establish different procedures for different classes of condemnors or different types of condemnation cases. But the California scheme does not send certain cases to the PUC and certain cases to superior court. Rather, cases of any sort can be brought in either forum. Thus, the availability of appeal and jury trial depend not on a legislative determination of appropriate procedure for a specific class of case but depend on the whim of the condemnor. Such an arbitrary basis for discrimination is contrary to the notion of equal protection.

(ii.) Humphrey v. Cady.

This Court in *Humphrey v. Cady, supra*, 405 U.S. 504 reached similar conclusions concerning an apparently arbitrary state classification that deprived petitioner of the right to a jury trial. In *Humphrey,* petitioner had been committed to the custody of a state agency for compulsory treatment pursuant to a statute concerning sex offenders. Following the procedures established by that statute, petitioner was entitled to a hearing before a judge. 405 U.S., at 507. But another state statute permitted certain mentally ill individuals to be committed only following a jury determination. 405 U.S., at 508. It appeared to this Court that the grounds for committing individuals under the two statutes were the same, although the case was remanded for the purpose of making such a determi-

nation. 405 U.S., at 510. This Court noted the seriousness of the equal protection issue raised by what appeared to be unlimited discretion vested in the state prosecutor to proceed under either state statute:

> "The equal protection claim would seem to be especially persuasive if it develops on remand that petitioner was deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other." 405 U.S., at 512.

The instant case presents a similar situation. Condemnors, which are instrumentalities of the state, are given unrestricted freedom to subject condemnees to either a jury trial or a proceeding in which there will be no jury. In the words of *Humphrey*, the allocation of the right to jury trial is left entirely to the "arbitrary decision of the State." *Ibid.* If there is any question as to the scope of discretion granted condemnors by the California statute, this Court should, consistent with *Humphrey*, remand for the purpose of examining that question.

(iii.) Logan v. Zimmerman Brush Co.

In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), this Court was confronted with both due process and equal protection claims. Appellant had filed a complaint with the Illinois Fair Employment Practice Commission alleging employment discrimination. State law required the commission to act on the complaint within a specified period of time. Apparently through inadvertence, the commission failed to act in time. The Illinois Supreme Court held that, as a result of the commission's failure to act, the appellant had lost his right to redress. 455 U.S., at 426-427.

The opinion of this Court reversed on due process grounds. 455 U.S., at 432. However, six members of this Court wrote or joined in concurring opinions deciding that, under a rational basis standard, equal protection had also been denied.

Justice Blackmun, who also authored the opinion of the Court, noted in his concurrence that the state law requiring prompt action by the commission had a legitimate legislative purpose: employers needed protection from frivolous charges of discrimination. 455 U.S., at 439. However, he concluded that, to the extent the statute terminated claims because the commission did not act promptly, the statute failed the second part of the rational basis test:

> "Here, of course, the [statute] may operate to terminate meritorious claims without any hearing at all, while allowing frivolous complaints to proceed through the entire administrative and judicial review process. . . . I have no doubt that [the statute] is patently irrational in the light of its stated purposes." 455 U.S., at 440.

Justice Powell employed a similar approach in his concurrence. Reasoning that the statute could have the legitimate purpose of protecting against frivolous claims or permitting the timely disposition of suits, he concluded that the second part of the rational basis test had not been satisfied:

> "[T]he challenged classification, which bore no relationship to the merits of the underlying charges, is arbitrary and irrational when measured against either purpose." 455 U.S., at 444.

A similar analysis prevails here. The California statute makes no effort to link the classifications which condemnors are empowered to create with any legitimate legislative purpose. Instead, the rights to meaningful appeal and jury trial can be extended or withdrawn at the whim of the condemnor.

In fact, the discrimination permitted by the California statute is far more troubling than that created by the statute in *Logan*. The classification at issue here is not the product of accident or inadvertence. Rather, as Judge Pregerson pointed out in his dissent from the decision below, common sense suggests that condemnors will take full partisan advantage of the unilateral power granted them to choose between alternative procedures. They will "simply avail themselves of those

procedures that favor their position." Appendix to Petition, p. A-20 and fn. 7. Thus, where it seems a jury may be sympathetic, the condemnor may be expected to choose the superior court forum. Where the PUC may seem more receptive to the condemnor's case than a jury or appellate court, the condemnor will select the PUC forum.

Consider the instance where a public agency is condemning two water utilities operating within its jurisdictional boundaries. One has the reputation of providing prolonged poor service to local customers; the other has given excellent service and stands in local good repute, but consistently has been at odds with the PUC. The condemning authority, without restriction and as a matter of course, can choose the local court and jury as a forum for case one and the PUC as a forum for the second matter. This power to choose a forum has more than just a hypothetical effect and compounds the unequal protection in the state scheme. As demonstrated in part III of this section, the PUC permits its legislative policies to influence the way it measures compensation when it sits as a tribunal in a valuation case.

It is almost inevitable that such considerations will influence a condemnor's thinking. Indeed, counsel for condemnor could conceivably violate counsel's obligations as a zealous advocate if he or she did not exploit the significant advantage bestowed by California law to choose forums and procedures. The Fourteenth Amendment should make this Court wary of the legitimacy of legislative purpose where a state awards itself procedural advantages in litigation seeking to deprive one of life, liberty or property.

C. The Ninth Circuit's Response.

The Ninth Circuit responded to the argument that the California statute fails the rational basis test. The response was that, even though unlimited discretion to discriminate is delegated to condemnors, it should be *assumed* that con-

demnors will only exercise that discretion consistent with legitimate legislative purposes:

> "[I]t is conceivable that the legislature rationally believed that cities would be in the best position to choose the appropriate forum. Although the legislature did not express criteria to govern the City's choice, this does mean [sic ?] that the City selects the forum for the specific purpose of depriving the utility of a jury or review by the state court of appeals. The selection of the administrative forum also deprives the City of a jury determination and intermediate review. Presumably, the legislature believed that the City would exercise its discretion in an appropriate manner."[1] Appendix to Petition, p. A-12.

This is a dangerous precedent which is inconsistent with the decisions of this Court. Applying this reasoning to *Humphrey v. Cady, supra*, 405 U.S. 504, this Court's equal protection concerns would be erased since it would be assumed that the state prosecutor who was given two procedures from which to choose would exercise the choice consistent with presumed legislative intent. Similarly, no equal protection issue would be presented in *Logan v. Zimmerman, supra*, 455 U.S. 422, since it would be assumed that the Illinois Fair Employment Practices Commission would only permit frivolous claims to expire.

The majority in the court below simply misconstrued the second part of the rational basis test. They assume that if, in some instances, the unlimited power to discriminate could be applied consistent with legislative purpose, then the creation of that power must be constitutional. But this Court has held that if the power to discriminate can be applied arbitrarily, the statute creating that power is not saved merely because the power may sometimes work rationally to advance the legisla-

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[1]The use of "sic" in the quote suggests error because, as written, the passage seems to state just the opposite of what the Ninth Circuit must have intended to say. Presumably, the passage should read "this does not mean . . . ."

tive purpose. For example, in *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court struck down the double-bond requirement even though it would logically tend to screen out some frivolous appeals. This Court held that the requirement was arbitrary since it *also* tended to burden non-frivolous appeals brought by those unable to post the bond. 405 U.S., at 78.

The Ninth Circuit's decision is dangerous because it establishes an easy to follow formula for any state wishing to insulate improper discrimination from the Equal Protection Clause. Instead of explicitly establishing an improper classification in a statute, a state need only delegate to one of it agents the unrestricted power to discriminate. The Ninth Circuit will then assume that any ensuing discrimination was employed for the purpose of advancing a legitimate legislative purpose. Such an assumption is made even in the face of circumstances which suggest, as here, that the classification is and will continue to be employed for other reasons.

In effect, this approach makes it impossible to fail the second part of the rational basis test since it assumes the necessary rational connection between the discrimination and the legislative purpose. The rational basis test is then converted into "a mere tautological recognition of the fact that [the legislature] did what it intended to do." *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 180 (1980) (Stevens, J., concurring in judgment).

Under the decision of the Ninth Circuit, even racial classifications normally subjected to a much higher level of scrutiny could be concealed and then assumed away. For example, a city might seek to condemn the property of a business owned by members of a racial minority. The city could then exercise its discretion under the California statute to select the PUC forum because the community from which a jury would be selected was composed primarily of members of that same minority. Alternatively, the city could select the superior court because very few persons of the particular racial minority make up the local jury panel. In either case, the majority below would simply assume the city had exercised its discretion

consistent with legitimate legislative purpose: the need to channel complex cases to the PUC. The improper racial discrimination would be concealed by the fiction that the city had proper motives. The need to apply a strict scrutiny test would never become apparent because an evaluation of the true motives of the city would not be undertaken.

This hypothetical underscores the need to apply the rational basis test to invalidate a state delegation of unrestricted discretion to discriminate. What seems to be an arbitrary classification is frequently an impenetrable mask for discrimination on a more invidious basis. If the dangers inherent in any arbitrary classification scheme are merely assumed away, interests which lie at the very core of the Fourteenth Amendment will be jeopardized.

III

THE DENIAL OF EQUAL PROTECTION IS SUBSTANTIAL AND AFFECTS SIGNIFICANT RIGHTS.

A petitioner claiming an equal protection violation bears the burden of demonstrating discrimination "of some substance." *American Party of Texas v. White*, 415 U.S. 767, 781 (1974), *rehrg. den.* 416 U.S. 1000. The opinion of the District Court below "relied primarily on the conclusion that the procedural differences in the forums are insufficient to give rise to an ascertainable injury." *Appendix to Petition, p. A-10.* The majority below seemed to agree that the denial of equal rights to appeal and to jury trial is not constitutionally significant: "The forum selection results in no ascertainable injury since the same substantive law is applied." *Appendix to Petition, p. A-13.*

This Court's decisions compel the conclusion that Petitioner has suffered a substantial denial of equal protection. Faced with a state statute which imposed different appellate bond requirements on different types of cases, this Court in *Lindsey*

v. Normet, supra, unmistakably held that the right to appeal was significant for equal protection purposes:

> "When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause . . . .
>
> "It cannot be denied that the double-bond requirement heavily burdens the statutory right of a [Forcible Entry and Wrongful Detainer] defendant to appeal." 405 U.S., at 77.

The right to appeal in the instant case has not been just heavily burdened. As noted in Part II, A of this section, Petitioner is afforded no meaningful appeal.

Similarly, this Court has also made it clear that the right to jury trial is important under the Equal Protection Clause:

> "the State, having made a jury determination generally available . . . could not, consistent with the Equal Protection Clause, arbitrarily withhold it from a few." *Humphrey v. Cady, supra,* 405 U.S. 504, 508 (1972), citing *Baxstrom v. Herold,* 383 U.S. 107, 110-112 (1966).

In fact, equal protection is more substantially eroded in this case than in either *Lindsey* or *Humphrey.* Both the right to jury trial and the right to a meaningful appeal are denied to condemnees brought before the PUC. *Lindsey* and *Humphrey* each concerned a denial of equal protection with respect to only one of those rights. The denial of both rights in the same case is doubly significant.

The rights to jury trial and meaningful appeal both check abuse of power on the part of the tribunal which conducts the trial. The availability of just one of these rights can, therefore, compensate for the absence of the other. The denial of both allows the tribunal to act with impunity.

Such a result is especially troubling in this case. While the PUC operates under a quasi-judicial aura when it sets just

compensation in a valuation proceeding, the Commission also has legislative functions. It adopts rules, regulations, and resolutions which, as policy statements, guide the staff and the Commission. Additionally, the PUC acts legislatively when it sets utility rates which requires valuing utility owned property to arrive at a valuation which is called a rate base. Having already established a valuation for rate-base purposes, the commission and its internally hired administrative law judges and staff cannot help but accept their own valuation (original cost less depreciation) as credible evidence.

This conflict between the PUC's dual roles has recently been confirmed. In February of 1986 the President of the PUC, in a concurring opinion rendered in a utility valuation proceeding, made clear that the PUC has a legislative policy in favor of encouraging the condemnation of certain investor-owned utilities. He also made it clear that the PUC will permit that policy to influence the way it measures compensation when it sits as a tribunal in such actions:

> "It is the policy of this Commission to encourage the consolidation of companies that can no longer stand alone as viable regulated utilities. The system of condemnation that we embrace to arrive at a fair market price must serve this broad policy objective and must not be permitted to operate in a counter-productive manner." *Petitions of the City of Fresno, Application Nos. 82-05-64 through 66 (Vial, P., concurring).*[2]

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[2]Copies of the opinion in question have been lodged with the Clerk of this Court. A rehearing in this case has been granted on grounds unrelated to the above.

In the same case, this philosophy was also expressed by then PUC Commissioner Bagley in a dissenting opinion.[3]

> "This decision transfers three small water companies to the City of Fresno at 'fire sale' prices. As such, it does grave injustice to the small owner and in turn tells the investor-owned water industry that when this Commission establishes market value in sale proceedings, you get a 'fair trial' and a 'hanging.'
>
> • • •
>
> "And finally a caveat: I should hope that this Commission will value these water companies on a case-by-case basis and not apply the majority opinion as an across-the-board precedent. Such a precedent would be a serious disincentive for sale and consolidation *which is contrary to the very core of Commission policy.* If, as we do, we want to encourage consolidation of small inefficient units, we must provide some price flexibility so that the small water company owner will not resist overtures to sell . . . .
>
> "It is the 'rate base' basis of the majority opinion and not the price per se to which I object." (Emphasis added.)

There is an acknowledged danger that the PUC may fix awards with an eye on its policy agenda rather than true market value. The District Court below found that petitioner had not proven the PUC was "systematically biased" and, thus, denied Petitioner's due process claim. It is precisely because bias is usually so difficult to prove that structural checks on the power of a tribunal are important. For these reasons, the denial to petitioner of both jury trial and meaningful appeal becomes especially significant.

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[3]Counsel for Amicus Curiae is a named defendant in this case in his former capacity as a PUC commissioner. The PUC has stipulated that he may appear as Amicus' counsel in this action.

IV

CONCLUSION

This Court should grant the Petition for Certiorari in this case and either reverse the decision of the Ninth Circuit or, as in *Humphrey v. Cady*, *supra*, remand for an evidentiary hearing. The decisions below establish dangerous precedents that threaten to eliminate the rational basis test as a viable standard while encouraging states to empower their agents to arbitrarily discriminate and withhold important rights.

December 30, 1986

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 445 So. Figueroa St., Los Angeles, California.

On December 30, 1986, I served the within Brief of Amicus Curiae In Re: "Jackson Water Works Inc. v. The Public Utilities Commission of the State of California" in the United States Supreme Court, October Term 1986;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on December 30, 1986, at Los Angeles, California

MICHELE MUIR